Calendar No. 736

100TH CONGRESS
2d Session

SENATE

REPORT
100-386

REPEAL OF SECTION 1631 OF THE DEFENSE AUTHORIZATION ACT OF 1985, TO PERMIT SUITS AGAINST CONTRACTORS WHO PARTICIPATED IN THE UNITED STATES ATOMIC WEAPONS TESTING PROGRAM

JUNE 17, 1988.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 612]

The Committee on the Judiciary, to which was referred the bill (S. 612) to repeal Section 1631 of the Department of Defense Authorization Act of 1985 (Public Law 98-525), having considered the same, a quorum being present, reports favorably thereon and recommends that the bill as amended by the subcommittee do pass.

CONTENTS

		Page
I.	Purpose	1
II.	Legislative History	2
III.	Discussion	2
IV.	Vote of the Committee	4
V.	Text of S. 612	4
VI.	Section-by-section analysis	5
VII.	Cost estimate	5
VIII.	Regulatory impact statement	7
IX.	Changes in existing law	7

I. PURPOSE

The purpose of proposed legislation is to repeal Section 1631 of the Department of Defense Authorization Act of 1985 (42 U.S.C. Sec. 2212 (Supp. III 1985)) and thus once again allow suits to be brought against contractors based on their participation in the United States atomic weapons testing program. Additionally, this bill would extend the period for filing suits that were dismissed or adversely affected by Section 1631.

S523-13

II. Legislative History

In the 99th Congress, Senator Murkowski introduced S. 2454, a predecessor bill to S. 612. This bill, which had 38 cosponsors, was referred to the Judiciary Committee, before which a hearing was held on June 27, 1986. The Judiciary Committee approved S. 2454 and Senator Thurmond reported it to the Senate on October 2, 1986 without any amendments or written report. The bill was placed on the Senate Calendar under General Orders; no further action was taken, however, as Congress adjourned.

The House passed similar legislation, H.R. 1338, in the 99th Congress. This bill, introduced by Rep. Rick Boucher, amended the Federal Tort Claims Act to permit actions to be brought against the United States for damages caused by exposure to radiation as a result of activity carried out by the contractors. This legislation provided for substitution of the United States as defendant if such action is brought against the contractor.

III. Discussion

The United States first began to develop the atomic bomb during World War II. The successor to the World War II program, the Atomic Weapons Testing Program, began in 1946. The program was carried out by the Atomic Energy Commission (AEC), which was created under the Atomic Energy Act of 1946. The AEC had the authority to experiment with and develop the use of atomic energy in the military forces.

In conjunction with the program, the United States hired a number of private contractors to develop and test atomic weapons.[1] Although the contractors were intimately involved with the development and testing of the weapons, the production of atomic bomb parts was authorized "only to the extent that the express consent and direction of the President of the United States has been obtained." [2] Generally, from the beginning, the United States agreed to indemnify the contractors for any costs of litigation, judgments or settlements sustained by the contractors as a result of their participation in the program.

Some 235 tests occurred between 1946 and 1962; these tests involved approximately 250,000 military and 150,000 civilian personnel. Both military and civilian participants in the above-ground tests suffer from various long-term medical injuries including leukemia and cancers of the bronchia, trachea, breast, thyroid, colon, esophsgus, kidney, stomach, skin, liver and pancreas, which they allege resulted from radiation exposure.

When the cancers were discovered, some of the injured parties sued the contractors for their alleged negligence in carrying out the testing program. In response to these actions, and despite their full indemnification contracts, the contractors took the position that they were not the appropriate party to be sued. They sought a change in the law to have the United States substituted as the de-

---

[1] Among the contractors hired were: Sandia National Laboratories, Lawrence Livermore National Laboratories, Los Alamos National Laboratories, Regents of the University of California, Pacific Northwest Laboratories, Batelle Memorial Institute, Associated Universities, Inc, and American Telephone and Telegraph.

[2] Atomic Energy Act of 1946, Section 91, 42 U.S.C. Section 2121.

fendant in any case brought against them involving their participation in the atomic weapons testing program.

The efforts of the contractors resulted in the approval of H.R. 5167, the Department of Defense Authorization Act of 1985, Public Law 98-525. Section 1631 of the Act, which was added during the House-Senate conference with no consideration by either the House or Senate Judiciary Committees, substituted the United States as a defendant in all cases brought by the victims of nuclear testing or on their behalf. It also provided that the Federal Tort Claims Act would apply in all of these cases.

The Federal Tort Claims Act provides the United States with a series of exemptions, not available to the contractors, which essentially immunizes the United States from any liability.[3] As a result of the exemptions, the impact of Section 1631 goes far beyond merely the substitution of the United States for the contractors. The actual effect of Section 1631 is the termination of most suits on behalf of the claimants, leaving the victims of ionizing radiation with no legal remedy whatsoever.

The negative impact of Public Law 98-525 was confirmed in In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), *cert. denied sub nom., Konizeski* v. *Livermore Labs,* 108 S. Ct. 1076 (1988). This was a consolidated action brought against the United States and the Federal contractors by various individuals asserting claims arising out of their alleged exposure to nuclear radiation during the bombing of Hiroshima and the atmosphere testing of nuclear weapons. Pursuant to Section 1631 of Public Law 98-525, the United States District Court for the Northern District of California substituted the Federal Government as defendant and dismissed the contractors. The court then dismissed both the civilian and military plaintiffs, relying on the exceptions to the Federal Tort Claims Act and the *Feres* doctrine.

The harsh impact of substituting the government as the defendant was also confirmed in *Allen* v. *United States,* 816 F.2d 1417 (10th Cir. 1987), *cert. denied,* 108 S. Ct. 694 (1988). A group exposed to radiation because they lived downwind from the test sites sued the Federal Government based on the claims that it was negligent in monitoring offsite fallout exposure and that it failed to warn people of the danger involved and the means by which they could protect themselves. The tenth circuit held that the government was

---

[3] The exemptions are:

TITLE 28, UNITED STATES CODE, SECTION 2680

EXCEPTIONS.—The provisions of this chapter and Section 1346(b) of this title shall not apply to—

(a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the descretion involved be abused [the discretionary function exception].

* * * * * * *

(j) any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war [the combatant activities exception].

(k) any claim arising in a foreign country [the foreign country exception].

The Supreme Court created another exception in *Feres* v. *United States,* 340 U.S. 135 (1950). The *Feres* doctrine stands for the rule that active duty service personnel cannot sue the Government for negligence.

not liable for deaths and injuries allegedly caused by the atomic weapons testing program. In reaching its decision, the court determined that the government's actions constituted an exercise of discretion and, therefore, that the government was exempt from suit under the discretionary function exception to the Federal Tort Claims Act.

IV. Vote of the Committee

Senator Paul Simon introduced S. 612 on February 26, 1987. It was referred to the Senate Judiciary Committee and later referred to the Subcommittee on Courts and Administrative Practice. No hearings were held since there was an extensive record of testimony on the issue from the 99th Congress.[4] On February 16, 1988, the subcommittee, a quorum being present, unanimously approved the legislation with an amendment. The amendment ensures that suits filed in a timely manner—but that were dismissed as a result of the application of Section 1631—can be refiled. On March 24, 1988 the full committee, a quorum being present, reported the bill favorably as amended by the subcommittee.

V. Text of S. 612

A BILL To repeal a provision of Federal tort liability law relating to the civil liability of Government contractors for certain injuries, losses of property, and deaths and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1631 of Public Law 98-525 (relating to the application of the remedy against the United States provided by sections 1346(c) and 2672 of title 28, United States Code, or by the Act of March 9, 1920, to any civil action for an injury, loss of property, personal injury, or death described in subsection (a)(1) of such section 1631) is repealed.

Sec. 2. (a) (1) The period during which section 1631 of Public Law 98-525 was in effect shall not be taken into account in computing the period provided in any Federal or State statute of limitations applicable to any civil action for an injury, loss of property, personal injury, or death described in subsection (a)(1) of such section.

(2) In civil actions which were filed before the date of enactment of section 1631 of Public Law 98-525, and were subsequently dismissed pursuant to the provisions of such section, the period beginning with the initial filing of such action and ending with the repeal of such section shall not be taken into account in computing the period provided in any Federal or State statute of limitations appliable to such civil actions.

(b) If the period provided in any Federal or State statute of limitations applicable to a civil action referred to in subsection (a) expires within one year after the date of the enactment of this Act (after the application of subsection (a) to that action), the action shall not be barred by such statute, but shall be barred if not commenced within one year after such date.

Sec. 3. Part IV of Chapter 28, United States Code, is amended—

(1) in the table of chapters by repealing the following:

---

[4] S. Hrg. 99-966 (June 27, 1986).

"99. General provisions..... 1631"

(2) by repealing the chapter heading as follows:

"CHAPTER 99—GENERAL PROVISIONS"

(3) by repealing the table of sections for chapter 99.

VI. Section-by-Section Analysis

Section 1 of S. 612 repeals section 1631 of Public Law 98–525 (relating to the application of the remedy against the United States provided by Sections 1346(c) and 2672 of title 28, United States Code). Section 1631 substituted the United States Government for the defense contractors in suits brought by veterans and civilians who participated in the atomic weapons testing program and who sought damages for radiation-related illnesses. By repealing Section 1631, both veterans and civilians will once again be able to file suit against the contractors.

Section 2(a)(1) provides that the period during which Section 1631 of Public Law 98–525 was in effect is not to be considered when computing the statute of limitations for those cases identified in Section 1 of this bill.

Section 2(a)(2) ensures that those who filed suit in a timely manner, but whose suits were dismissed as a result of the application of Section 1631, have the opportunity to refile their claim. Under this provision, in any civil action filed before Public Law 98–525 was enacted, the period of time from the filing to the repeal of Section 1631 shall not be considered in computing the statute of limitations. This section effectively would place the dismissed actions at the same point in the judicial process as they were at the time of passage of Section 1631.

Section 2(b) extends for one year the statute of limitations on all applicable civil actions in which the statute of limitations would expire within 1 year after the enactment of S. 612.

Section 3, the technical amendment section, removes some minor language from the existing law.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, April 19, 1988.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 612, a bill to repeal a provision of Federal tort liability law relating to the civil liability of government contractors for certain injuries, losses of property, and deaths and for other purposes, as ordered reported by the Senate Committee on the Judiciary, March 24, 1988.

This bill would repeal Section 1631 of Public Law 98–525 and allow suits to be brought against contractors who participated in the U.S. Atomic Weapons Testing Program. S. 612 would also

extend the time period for filing for those suits that were dismissed or adversely affected by Section 1631 of Public Law 98–525.

Under the provisions of their contracts, the contractors would almost always be indemnified by the government for all costs of litigation, judgments or settlements. Such suits were allowed prior to October 1984. Section 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985 (Public Law 98–525), however, established the United States as defendant in these cases, but provided that such cases would fall under the jurisdiction of the Federal Tort Claims Act (FTCA). The FTCA provides the United States with certain defenses that effectively bar judgments on behalf of many claimants. For example, the *Feres* doctrine established by the Supreme Court precludes judgments against the U.S. Government under the FTCA for injuries to servicemen incurred in the course of their service. Thus, veterans are entitled to seek compensation for service-related injuries from the Veterans Administration, but cannot sue the government if their claims are not approved. (The Veterans Administration has granted benefits for only a small percentage of claims from veterans for exposure to radiation from atomic weapons tests. Prior to enactment of Public Law 98–525, such claimants were able to sue private contractors.) Similarly, suits by Federal civilian employees are precluded by the Federal Employees Compensation Act.

S. 612 would repeal Section 1631 of the 1985 act and again allow suits to be brought against private contractors. By freeing injured parties from the limitations involved in suing the Federal Government, and because the government would almost always indemnify the private contractors, S. 612 could result in significant costs to the Federal Government for increased litigation, judgments and settlements. The amount of such costs is very uncertain, and we cannot estimate them. They would depend on the number of suits brought, the success of those suits, and the amount of awards in successful suits. These in turn would depend on the extent of exposure and the incidence of illness attributable to that exposure. Based on information from the Departments of Justice, Energy, and Defense, as well as research and advocacy groups, it appears that between 200,000 and 250,000 servicemen may have been exposed to radiation as a result of atomic weapons tests. This figure does not include civilian government workers, employees of private contractors and civilians who may have been downwind of the atomic weapons tests. Estimates of the proportion who might file suit have ranged as high as 20 percent, but we cannot predict either the number of suits or the magnitude of the resulting awards. Currently, suits seeking approximately $2 billion from the Federal Government are pending or on appeal, consisting largely of suits on behalf of affected parties who were not government employees.

In addition to the cost of judgments and settlements, the Federal Government could incur substantial litigation costs, both for indemnifying the private contractors for their legal costs and for the increased court workload. As with the estimate of potential judgments, these costs are highly dependent on circumstances that cannot be predicted at this time.

No costs would be incurred by State or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

VIII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concluded that this bill will not have any regulatory impact.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing laws proposed to be made by S. 612 are shown as follows: existing law to be omitted is enclosed in black brackets.

UNITED STATES CODE

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

[CHAPTER 99—GENERAL PROVISIONS

[Sec.
[1631. Transfer to cure want of jurisdiction.

[§ 1631. Transfer to cure want of jurisdiction

[Whenever a civil action is filed in a court as defined in section 610 of this title or a appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.]

PART IV—JURISDICTION AND VENUE

Chapter	Sec.
81. Supreme Court	1251
83. Courts of Appeals	1291
85. District Courts; Jurisdiction	1330
87. District Courts; Venue	1391
89. District Courts; Removal of Cases from State Courts	1441
91. United States Claims Court	1491
93. [Repealed.]	
95. Court of International Trade	1581
97. Jurisdictional Immunities of Foreign States	1602
[99. General Provisions	1631]

○